FILE COPY

No. 324

In the

Supreme Court of the United States

October Term, 1960

DAYTON RUBBER COMPANY,
Petitioner

v.

CORDOVAN ASSOCIATES INCORPORATED
Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOTE ON ABBREVIATIONS

For purposes of convenience, we shall follow the abbreviations adopted by petitioner. Thus, Dayton Rubber Company shall be referred to herein as "Dayton"; Cordovan Associates, Incorporated as "Cordovan"; and White Stores, Inc. as "White".

QUESTION PRESENTED

The petitioner's statement of the Question Presented contains inaccuracies which should be corrected in order

that this Court will not be misled as to the true nature of the controversy here.

The petitioner states (p. 2), ". . . . the trial judge held that Dayton was not so required" (to accord the associates and approved distributors of Cordovan the same prices which it accorded its other chain store customer, White Stores, Inc.). The District Court actually held that under the valid and enforceable contract between Dayton and Cordovan the prices *did* have to be the same to both customers (see petitioner's Appendix 9a) *unless and until* Dayton unilaterally lowered its prices to one of its customers by giving the lower prices a different name, which (according to the District Court) it apparently was free as a matter of law to do at any time and actually did in the present case.

The petitioner quotes one (No. 28) of the 29 separate findings of the District Court, and states that the Court of Appeals reversed the judgment of the trial court "because it disagreed with that finding." As will be shown herein, however, the Court of Appeals unanimously reversed the judgment of the trial court because of the failure of that court to apply correct legal rules to the undisputed facts.

Because the finding relied upon by the petitioner was ambiguous enough to *allow* a contrary result, the Court of Appeals necessarily had to disagree with any implications of that finding which were contra its unanimous decision on the merits of the case.

Such disagreement does not mean that the Court of Appeals would have reached a different decision even had this finding been upheld, nor does it mean that the Court of Appeals was not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.ed. 746, 766 (1948).

STATEMENT

The sole issue before the District Court and the Court of Appeals in this case was the proper legal interpretation of the term "prices prevailing on date of shipment" in a requirements contract for the sale of automobile tires and tubes between Dayton (its Chain Store Division), the seller, and Cordovan, the purchaser.

Cordovan maintained that this term in its contract with Dayton bound Dayton to charge the associates and approved distributors of Cordovan prices no higher than those charged any other customer of the Chain Store Division of Dayton for the same items. In other words, this phrase incorporated the "one price to all" policy which Dayton had at the time the contract was executed and which had always been in effect throughout the entire course of dealing between the parties.

The trial court found, as a fact, that Cordovan had purchased its requirements of tires and tubes from Dayton since 1947, and that all such sales had been handled by the Chain Store Division of Dayton. (Apdx. 2a) Also since about 1947, Dayton sold tire casings and tubes through its Chain Store Division to White Stores, Inc., and to independent automotive chain stores who purchased a private brand tire and casing owned by Dayton and known as "Road King." (Apdx. 2a) These three — Cordovan, White, and the set of independent businesses which purchased "Road King" tires and tubes — were the only customers of the Chain Store Division since its formation in 1947. (Apdx. 2a)

The trial court found, *as a fact*, that throughout the entire course of dealing between Cordovan and Dayton, since 1947 and until June 1, 1958, the net billing prices for tires and tubes "were identical as between all customers" of the Chain Store Division of Dayton. (Apdx. 3a) The

trial court further found, *as a fact*, that these uniform prices were not accidental but were the result of an actual "pricing policy established and in effect in the Chain Store Division of Dayton Rubber, applicable alike to all customers of such Division, whereby identical base or net billing prices were established for all tires and tubes sold through such Division to all customers thereof." (Apdx. 3a) The trial court found *as a fact* that such prices fluctuated from time to time with industry conditions, generally on a quarterly basis, but that such fluctuations were applied uniformly and identically to all customers and that "this policy" was known to all of the customers of the Chain Store Division. (Apdx. 3a)

In the summer of 1956, Dayton determined to abandon its efforts to promote its "Road King" brand and to concentrate on expanding its chain store business through Cordovan and White. (Apdx. 4a) To protect itself in this regard, Dayton proposed written requirements contracts to Cordovan and White for terms of three years each. (Apdx. 3a)

The two contracts were both prepared by Dayton (Apdx. 4a) at a time when its pricing policy of uniform prices was found by the trial court to be in existence and known to all parties. (Apdx. 3a) The trial court found, *as a fact*, that prior to August 16, 1956 (the date of the meeting of the Board of Directors of Cordovan at which the proposed contract prepared by Dayton was considered), Cordovan "had been told of this uniform pricing policy, and that base or net billing prices for tires and tubes of the same kind, quality and size were identical as between all customers of such Division." (Apdx. 3a) Both contracts, as prepared by Dayton and accepted by the two remaining customers of its Chain Store Division, provided for "prices prevailing on date of shipment." The Cordovan contract (and necessarily, the White contract) was found by the

trial court, as a matter of law, to be valid and binding. (Apdx. 8a) There was no contract or arrangement between Cordovan and White.

White signed its contract for three years, beginning August 1, 1956. Cordovan, after consideration by its Board of Directors and its various associates, signed its contract for a term of two years, beginning November 1, 1956.

Prices to the two customers remained identical for the same items until June 1, 1958, (Apdx. 5a) when Dayton gave White a price reduction of about 10% (Apdx. 7a) without effecting a corresponding reduction in the prices charged to Cordovan for the same items. (Apdx. 8a) The contract between Cordovan and Dayton, calling for "prevailing" prices, was still in effect at that time and remained in effect throughout its term ending October 31, 1958.

In February, 1958, Dayton had granted both White and Cordovan a new bonus program, which in effect gave the two customers larger bonuses by calculating them on the combined purchases of both. (Apdx. 6a) The trial court found that this "concession" was within the terms of the two contracts. (Apdx. 6a)

Cordovan had been negotiating for some time for a new contract to replace the existing one, but the negotiations proved fruitless and the existing contract with Dayton continued in full force and effect to the end of its term. (Apdx. 6a-7a) After reducing its prices to White, Dayton offered Cordovan the same lower prices if it would accept certain conditions. The conditions were wholly unacceptable to Cordovan. (Apdx. 8a) There were *no* conditions to the new, lower prices Dayton gave to White. (Apdx. 7a) White at that time was still obligated by contract to continue purchasing all its requirements of tires and tubes from Dayton for another fourteen months.

The trial court found, as a fact, that Dayton established its prices "on what is known in the trade as a 'cost justification' basis." (Apdx. 2a) It made no findings in explanation of this phrase. Nor did the trial court find that this so-called pricing formula was a pricing "policy" of Dayton, or was known by its customers or was told to Cordovan before or at the time it entered into its contract with Dayton.

When Cordovan ascertained that White was receiving lower prices, it instructed its associates and approved distributors to withhold payment on all tires and tubes shipped by Dayton after June 1, 1958. To resolve the controversy, Dayton brought this Declaratory Judgment action.

Contrary to the statement of petitioner on page 4 of its petition, Dayton never contended that the disputed contract phrase had reference to a pricing formula. The position of the petitioner was that under its contract with Cordovan it could legally charge anything it pleased. This position was put forward by Mr. Goodenberger, witness for the petitioner and its Vice President in charge of sales, tire division, in the following words: "I could have charged them $100.00 a tire." (Appendix to Brief for Appellant, Page 29a.) The trial court held, as a matter of law, that Dayton was bound to charge identical prices to Cordovan and White under its separate contracts with each (Apdx. 9a), but that it was no longer so bound if it chose in its own discretion to change merely *the label* it attached to its internal bookkeeping method of computing prices.

In the course of its detailed findings, the trial court stated that there was no provision, nor were there facts from which an inference could be drawn that Cordovan prices were to be "tied to" White prices "under all circumstances". (Apdx. 8a)

Cordovan on appeal accepted all *facts* found by the District Court and contended that on those facts the decision should be reversed because the trial court ignored certain fundamental rules of contract law and general law. As to the single Finding No. 28, Cordovan pointed out that both it and the judgment of the trial court stemmed from fundamental misapprehensions of Cordovan's case and the law applicable, and, further, that that finding was wholly inconsistent and in conflict with all other special findings of fact made by the trial court, and did not preclude a decision for Cordovan. Cordovan, after all, never contended its prices were "tied to" White's prices, but, rather, that it was entitled to the lowest prices charged by Dayton to any other customer for the same items.

The Court of Appeals, to complete the quotation given by petitioner on page 7 of its petition, observed that the decisive question was the contention of Cordovan "that the 'prevailing prices' clause in its contract with Dayton Rubber Company entitled it to the same prices given by appellee to White Stores under an identical pricing clause in the contract between the rubber company and White Stores; and that all parties understood the prices were to be the same to each of the two large chain-store customers." The citation of *Chandler* v. *United States*, 226 F.2d 403, 405 (7th Cir., 1955) by the Court of Appeals shows that the Court viewed this decisive question as one of *law*.

While the Court of Appeals did state that it was free to disagree with the finding in issue, it is incorrect to claim, as petitioner does, that the per curiam decision of the Court of Appeals was the result of a simple "disagreement" with the District Court concerning factual inferences which could be drawn from undisputed facts. The Court of Appeals held that the "manifest meaning of the language used" in the contract, reinforced by the undisputed *actions* of the parties and the "uniform pricing

policy" of the petitioner, compelled, in effect, a decision for Cordovan, *under applicable rules of law*. (Apdx. 16a-17a)

The Court of Appeals did not "disagree", as petitioner claims, with the District Court on those matters. The District Court made no statement at all concerning the "manifest meaning of the language used", except perhaps in its "Conclusions of Law and Fact" where it held that the use of the term "prevailing prices" in the same way in both the Cordovan and White contracts meant that "White prices and Cordovan prices would be the same." (Apdx. 9a)

It can hardly be said that the Court of Appeals disagreed with the District Court as to the uniform pricing policy of the petitioner, since it relied upon the findings of the District Court (Apdx. 3a) as to the existence of this policy. As to the practical interpretation placed on the contract by the parties, the Court of Appeals merely recited the undisputed facts found by the District Court. It was the *actions* of the parties, not any secret intent regarding magic phrases with no known meaning (such as "Cost Justification"), which, under the precedents cited by the Court of Appeals, clearly revealed the practical, i.e., working, interpretation put on the contract by the parties.

Incidentally, neither the facts found by the District Court nor anything in the entire record indicates any of the parties ever attached any particular importance to the phrases "Cost Justification" or "based on cost". Dayton did not please White by offering it "based on cost" prices. It gave White *lower* prices. White did not know or even care what jargon clothed these lower prices. In his deposition, Mr. White, President of White Stores, Inc., in response to a question as to whether White and Dayton entered into a new "pricing arrangement" in May or June of 1958, stated: "Well, I couldn't say that we en-

tered into a new pricing arrangement, but I can say that Dayton . . . presented us with a new low price that was approximately 10½ or 10 and three-quarters per cent lower price than we had been buying at." (Appendix to Brief for Appellant, p. 36a)

REASONS FOR NOT GRANTING A WRIT IN THIS CASE

I. Conflict Within a Circuit is not a Ground for Granting a Writ of Certiorari.

The petitioner dwells at length on an alleged conflict between different judges of the Sixth Circuit on the question of whether Rule 52(a), F.R.Civ.P., applies to inferences and conclusions drawn from undisputed facts. Of the twenty-two cases cited by petitioner as illustrating such a conflict in the Courts of Appeals, no less than twelve are from the Sixth Circuit alone.[1] It is settled, however, that "contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A, 541, 552 (1958).[2]

Such cases in the Sixth Circuit, moreover, as would appear at first glance to be conflicting, actually resolve them-

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[1] Willett v. *C.I.R.*, 277 F.2d 586 (6th Cir. 1960); *United States* v. *Allinger*, 275 F.2d 421 (6th Cir. 1960); *Wright* v. *C.I.R.*, 274 F.2d 883 (6th Cir. 1960); *C.I.R.* v. *Consolidated Premium Iron Ores, Limited*, 265 F.2d 320 (6th Cir. 1959); *Gudgel* v. *C.I.R.*, 273 F.2d 206 (6th Cir. 1959); *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F.2d 304 (6th Cir. 1958); *Wise* v. *C.I.R.*, 261 F.2d 354 (6th Cir. 1958); *Yunker* v. *C.I.R.*, 256 F.2d 130 (6th Cir. 1958); *Rich* v. *Pappas*, 229 F.2d 308 (6th Cir. 1956); *Seagrave Corp* v. *Mount*, 212 F.2d 389 (6th Cir. 1954); *E. H. Sheldon and Co.* v. *C.I.R.*, 214 F.2d 655 (6th Cir. 1954); *Letcher County* v. *DeFoe*, 151 F.2d 987 (6th Cir. 1945).

[2] It would seem that the proper way to resolve such a conflict, if one exists, is that adopted by the Seventh Circuit, which recently sat *en banc* to settle the scope of review applicable to patent litigation. *Armour and Co.* v. *Wilson & Co.*, 274 F.2d 143 (7th Cir. 1960).

se'ves along the same lines as will be discussed later in relation to cases of alleged conflict from other circuits.

II. The Alleged Conflict in the Sixth Circuit is no longer of importance.

On June 13, 1960, this Court rendered its decision in *Commissioner* v. *Duberstein*, — U.S. —, as petitioner itself has pointed out. In the course of that opinion this Court held that the "clearly erroneous" rule, F.R.Civ.P., 52(a), "applies also to factual inferences from undisputed basic facts . . .". On August 10, 1960, the Court of Appeals for the Sixth Circuit rendered its decision in *Commissioner* v. *Spermacet Whaling & Shipping Co., S/A*, — F.2d — (not yet reported) (See Appendix). In the course of that opinion, Judge Miller took explicit note of the alleged conflict of which petitioner complains. He then cited and quoted from the opinion of this Court in the *Duberstein* case that "factual inferences from undisputed basic facts" receive the protection of Rule 52(a), F.R.Civ.P. Judge Miller recognized the *Duberstein* decision as settling any conflict concerning factual inferences, whether they be ultimate facts or not, drawn by a trial court from undisputed basic or evidentiary facts (Apdx. 6b-8b).

Judge O'Sullivan, who was a member of the panel which heard and decided the present case, joined in the opinion of Judge Miller in the *Spermacet* case.

There was a dissent by Judge Simons but it was based upon a close analysis of the facts and did not take issue with the holding of Judge Miller regarding the effect of the opinion of this Court in the *Duberstein* case. Judge Simons, it may be noted in passing, was a member of the panels which decided *Rich* v. *Pappas*, 229 F.2d 308 (6th Cir. 1956) and *Wright* v. *C.I.R.*, 274 F.2d 883 (6th Cir

1960), both being leading cases for the "correct" view on the scope of review under Rule 52(a), F.R.Civ.P.

It thus appears that the *Duberstein* case is having exactly the effect in the Sixth Circuit petitioner claims it should have, and there is no need for this Court to reiterate its stand again, twice within the same sixth month period, on the same issue, even if the petitioner were correct (which it is not) in claiming the Court of Appeals committed error in the present case.

III. The alleged conflict between the Circuits on the issue presented by petitioner dissolves upon examination of the cases cited by petitioner.

Of the remaining ten cases cited in the petition to prove a present conflict worthy of resolution by this Court, six[3] are in full accord with the correct rule, as settled by this Court, regarding factual inferences drawn from undisputed facts. Thus a total of four cases[4] from four different circuits are left as "proof" of a present conflict.

One of these circuits is the Seventh Circuit, which in *Chicago, B. & Q. R. Co.* v. *United States,* 221 F.2d 811 (7th Cir. 1955), stated that where the facts were stipulated and in documentary form the Court of Appeals could reach its own conclusions. The Court there also held, however, that upon the authority of the Supreme Court it could review a question of tariff interpretation as a matter of law. The Court then reversed the lower court

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[3] *Texas Co.* v. *R. O'Brien Co.*, 242 F.2d 526 (1st Cir. 1957); *Coleman* v. *Sears, Roebuck & Co.*, 238 F.2d 206 (8th Cir. 1956); *Bishop* v. *United States*, 223 F.2d 582 (D.C. Cir. 1955), 350 U.S. 961; *Hycon Manufacturing Co.* v. *H. Koch & Sons*, 219 F.2d 353 (9th Cir. 1955), cert. den., 349 U.S. 953, 75 S.Ct. 881, 99 L.Ed. 1278 (1955); *Kaye* v. *Smitherman*, 225 F.2d 583 (10th Cir. 1955); *Central Ry. Signal Co.* v. *Longden*, 194 F.2d 310 (7th Cir. 1952).

[4] *United States* v. *One 1950 Buick Sedan*, 231 F.2d 219 (3rd Cir. 1956); *Kraft Foods Company* v. *C.I.R.*, 232 F.2d 118 (2nd Cir. 1956); *Chicago Burlington & Quincy R. Co.* v. *United States*, 221 F.2d 811 (7th Cir. 1955); *Stevenot* v. *Norberg*, 210 F.2d 615 (9th Cir. 1954).

upon the authority of an analogous case. The precedent value in tariff rate decisions is of obvious importance, and the court there was fully justified in treating the matter as one of law.

In any case, the Seventh Circuit may no longer be cited as conflicting with the other circuits on the point in question. See *Snorgrass* v. *Sears, Roebuck & Co.*, 275 F.2d 691 (7th Cir., March 1, 1960), which the petitioner failed to note in its petition.

Three cases remain to indicate a present conflict. One of these is *Stevenot* v. *Norberg*, 210 F.2d 615 (9th Cir. 1954). The Court there said that it was free to draw its own conclusions where the questioned finding "is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts." (210 F.2d 615, 619) The Court did *not* say that *factual* inferences were not to be accorded the protection of Rule 52(a), F.R.Civ.P. It was merely stating in a different way the rule that where the so-called "ultimate fact" is "reached by processes of legal reasoning from, or the legal significance of, the evidentiary facts, it is subject to review free from the restraining impact of the so-called 'clearly erroneous' rule." *Gamble* v. *Commissioner*, 242 F.2d 586 (5th Cir. 1957).

The Fifth Circuit, incidentally, is one of those which could have been cited by petitioner as being on the "correct" side of this question. See *United States* v. *Kaplan*, 277 F.2d 405 (5th Cir. 1960) and *United States* v. *Schultetus*, 277 F.2d 322 (5th Cir. 1960), both decided on April 18 of this year.

In any case, the Ninth Circuit in *Stevenot* v. *Norberg*, *supra*, did not say that it disagreed with the questioned finding of the trial court. It reversed the trial court *on a point of law*, while holding that the questioned finding did not have the effect claimed for it by the appellees

because it had to be read in connection with the stated reason of the lower court for its legally incorrect decision. Thus, the point proved immaterial in that case.

Of the two remaining cases which petitioner claims indicate a present conflict, both were decided back in 1956. In one, *Kraft Foods Company* v. *Commissioner*, 232 F.2d 118 (2nd Cir. 1956), the Court of Appeals admittedly said that where the evidence before the Tax Court consists of stipulated facts it was free to draw its own "inferences of ultimate fact from the record." (232 F.2d 118, 122) But the Court there reversed the Tax Court only after an exhaustive review of the facts and the application of a different legal rule to them than that used by the Tax Court.

In *United States* v. *One 1950 Buick Sedan*, 231 F.2d 219 (3rd Cir. 1956), the Court of Appeals also applied a different legal standard to the facts than that used by the District Court, and held that the facts "definitely established" the ultimate conclusion which the District Court had not found. The Court of Appeals thus found the ultimate finding of the trial court clearly erroneous whether it used those two words or not.

These cases have been analyzed to point out that the alleged conflict which petitioner points to is primarily one of semantics. Space does not permit presentation here of an extended analysis of the cases on the so-called "correct" side of the issue, but upon careful examination it will be apparent that, just like the four cases analyzed above, there is not the slightest indication any of these cases would have been decided differently no matter which side the Court might have taken regarding inferences from undisputed facts. This is true even in the Sixth Circuit, as dramatically illustrated by the concurrence of Judge Miller, one of the most outspoken proponents of the view that Rule 52(a) applies to factual inferences, in the decision of the court in *Yunker* v. *C.I.R.*, 256 F.2d 130 (6th

Cir. 1958), frequently cited as a leading case for the opposite view.

The most recent of the so-called "conflicting" decisions from other circuits occurred back in 1956. The recent cases are in full accord with the holding of this Court that factual inferences and conclusions are protected by Rule 52(a), F.R.Civ.P. All the argument over the problem since 1956 seems to have taken place merely among the judges of the Sixth Circuit alone, and even here it appears, judging from *Commissioner* v. *Spermacet Whaling & Shipping Co., S/A*, — F.2d — (6th Cir., August 10, 1960), that the decision of this Court in *Commissioner* v. *Duberstein*, — U.S. —, is having the salutary effect of resolving any differences among the various judges of the Sixth Circuit.

The issue in all these cases really resolves itself down to the question of *what* is a *factual* inference, not whether Rule 52(a) F.R.Civ.P., applies to such inferences. As Justice Frankfurter has said, "Though labeled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made." *Baumgartner* v. *United States*, 322 U.S. 665, 671, 64 S. Ct. 1240, 1243, 88 L. Ed. 1525, 1529.

It is respectfully submitted that an analysis of all the cases cited by petitioner as evidence of a conflict will reveal very little, if any, conflict when classified on the basis of the particular issues involved and the particular results reached by the reviewing court. Such conflict as may still exist is largely a matter of semantics, marring the tidiness of hornbook law perhaps, but irrelevant to the actual decisions reached on particular issues and cases.

A problem of this sort, moreover, is not one that promotes any uncertainty in the law office when a client seeks advice. It does not affect at all the guidance which the law is expected to give to people planning their affairs

and business transactions. It is submitted that the prime function of this Court is to resolve conflicts between the Courts of Appeals which make uncertain this guidance which law should afford people.

We see no reason for this Court to concern itself here with an issue of declining importance, flickering along only in one Circuit, concerning only one finding of a "fact" which is not inconsistent with the decision of the Court of Appeals, and especially after this Court has spoken so recently (and apparently effectively) on this very question in *Commissioner* v. *Duberstein*, — U.S. — decided June 13, 1960.

IV. The Court of Appeals did not commit any error in its decision in this case.

A brief in opposition to a petition for certiorari is no place for an extended argument on the merits of the case, nor do we intend to make one here. The assertion of the petitioner, however, that the Court of Appeals committed manifest error justifying a reversal on the merits without even the opportunity of submitting briefs on the case impels us to point out, in summary fashion, the grounds for the decision below.

The Court of Appeals simply took the plain language of the contract and all relevant facts found by the trial court and enforced the contract according to its "manifest meaning," holding that it would be "illogical" to allow a seller to charge one of its two customers a lower price for the same item, when both have contracts to receive goods at "prevailing prices." (Apdx. 15a-16a) This interpretation of the manifest meaning of the language used in the contract was reinforced by the *actions* of the parties under the contract and during their entire course of dealing (approximately nine years) before entering into

this contract. Under the law both as settled in the Sixth Circuit and the State of Ohio, this practical interpretation of the contract by the parties carries great weight, if indeed it does not control. The District Court had completely ignored this rule of law in its decision, although it had found all the necessary facts to make it applicable.

Without elaborating on the matter at this time, we wish to point out that Cordovan demonstrated in its brief and oral argument before the Court of Appeals that not only is the interpretation of the contract advanced by Cordovan (and accepted by the Court of Appeals) the proper and required one under the law and upon the facts as found by the District Court, but also that the various interpretations advanced by petitioner and the District Court constituted, to say the least, novel innovations in contract law that would render the entire contract void for want of mutuality.

The petitioner claims that the Court of Appeals fished "in the troubled waters of conflicting inferences." Actually, the only angling being done here is being done by the petitioner, who tries very hard to go behind the facts found by the District Court and search out bits of evidence which, it claims, the District Court "undoubtedly had in mind" or "may also have had in mind" when it promulgated Finding No. 23. It is clear, however, that the District Court made a very simple statement — that there were no facts from which an inference could be drawn that Cordovan prices were "to be tied" to White prices "under all circumstances"

The finding *does not* hold that Cordovan prices were not to be the same as White's *under the circumstances of this case*. Nor does it hold, as petitioner tries very hard to suggest, that Cordovan was not entitled to the prevailing price, which is fixed as the lowest price charged any other customer of Dayton for the same items. For

instance, suppose Dayton had raised White prices. There is no evidence, as the District Court found, that the Cordovan prices would then have to go up as they would if they were "tied to" White prices.

Actually, White could have gone out of business and Dayton acquired a dozen new customers, but the contract between Dayton and Cordovan would have continued to subsist as valid and enforceable.

While the particular finding which the petitioner complains the Court of Appeals merely "disagreed" with *can* be construed, if read in certain ways, as contrary to the decision of the Court of Appeals, is there any doubt from the opinion of the Court of Appeals that all three judges found such finding, so construed as petitioner claims, to be "clearly erroneous"? Does the Court have to use those exact words? Is it not clear that the entire Court was left with the definite and firm conviction that a mistake had been made by the District Court in its application of the law to the facts as found by that court?

Even if the petitioner is correct, which we certainly do not concede and are prepared to argue if necessary, a hearing by this Court would, for the reasons pointed out above, be of importance only to the two private parties involved in the case. The petitioner has had its day in court.

CONCLUSION

We submit that the Court of Appeals committed no error in its decision; that a reversal of the decision without further briefs or argument would result in a manifest injustice to respondent; that for the reasons advanced herein there is no conflict among the Courts of Appeals worthy of the attention of this Court; and that any further statements by this Court on the problem of semantics which this petitioner is attempting to raise here are unnecessary.

We respectfully request this Court to deny the petition for certiorari.

Respectfully submitted,

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APPENDIX

No. 13887

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SPERMACE[illegible] WHALING & SHIPPING CO., S/A,
Respondent.

Petition for Review of the Decision of the Tax Court of the United States
(Decided August 10, 1960.)
(Filed August 10, 1960.)

Before SIMONS, Senior Judge, MILLER and O'SULLIVAN, Circuit Judges.

MILLER, Circuit Judge. The respondent, Spermacet Whaling & Shipping Co., is a corporation organized under the laws of the Republic of Panama. During the period of April, 1947, through the latter part of January, 1948, it participated in a fishing expedition for sperm whales and the production of sperm oil off the western coast of South America. It received from these operations during its fiscal year ending April 30, 1948, net income of $924,979.72. The respondent, as a foreign corporation, contends that not any of such net income is taxable to it by the United States.

The Commissioner ruled otherwise and made a deficiency assessment of $351,492.29.

The facts are most interesting, but lengthy. They are set out in detail in the Findings of Fact and Opinion of the Tax Court, reported at 30 T. C. 618, to which reference is made. The following summary is sufficient for our present purposes.

Sperm oil is obtained from the sperm whale and is used for industrial purposes, primarily as an additive to lubricants. In 1946 sperm oil was in short supply, primarily because the Norwegian whaling fleets had been depleted by enemy action during World War II, and because the whaling fleets then in operation were required to be used principally for the production of edible oils. Norway was the largest producer of whale oil in the world.

A typical whaling expedition to obtain crude sperm oil consists of a large mother or factory ship and a number of killer boats. The killer boats are used to catch the sperm whales and to tow them to the factory ship where the sperm oil is extracted. The operation is carried on without operational contact with a base station located in coastal waters.

Archer-Daniels-Midland Company, a Delaware corporation, hereinafter called A.D.M., was engaged in the business of purchasing, processing and selling certain special oils, including sperm oil. Because of the limited supply it faced a critical business need. Smith, its Executive Vice-President in Cleveland, Ohio, contacted Jahre, one of Norway's leading whalers, for the purpose of organizing a new whaling company to engage in the production of sperm oil. Jahre caused the Falkland Shipowners Limited, a British corporation, which he indirectly controlled, to acquire from the British Government an old factory ship called the *Anglo Norse*, which required a considerable expenditure of money to put it in suitable condition. He had at his disposal suffi-

cient killer boats to outfit a whaling expedition. After considerable negotiations, Jahre, Smith and others, in December, 1946, caused the respondent to be incorporated under the laws of Panama. It held its first meeting of its board of directors in New York City on December 12, 1946.

Jahre returned to Norway and attempted to obtain for respondent a charter of the *Anglo Norse* from Falkland. Since Falkland was a British corporation, it could not execute such a charter to the respondent, a foreign corporation, without the approval of the British Government. The British Government refused to consent on the ground that Panama, the country of respondent's incorporation, had not subscribed to the International Whaling Agreement.

Jahre proposed that A.D.M. charter the *Anglo Norse* and then permit respondent to manage the sperm oil expetition, but A.D.M. refused to be a party to such an arrangement. After discussing the situation among themselves, respondent's Norwegian shareholders proposed to Smith that Smidas Company, Inc., hereinafter called Smidas, charter the vessel and then work out some definitive relationship with respondent for the conduct of the expedition. Smidas was an Ohio corporation, incorporated on February 19, 1945, engaged in promoting export business of certain technical items. At the time of its incorporation Smith acquired 54.5 per cent of its capital stock. After some negotiation, Smidas accepted the proposal. On or about February 4, 1947, a "bare boat charter party" was negotiated in Europe and there signed by Falkland as the owner of the *Anglo Norse*, by which Smidas chartered the vessel for a period of four years, with options to renew for further periods totaling six years, for $50,000.00 per annum.

By contract dated March 8, 1947, between Smidas and respondent, respondent assumed all of the obligations of

Smidas under the charter party and agreed to organize, equip and manage the whaling expedition. It was to receive for its services and the obligations assumed, the proceeds to be received by Smidas from the sale of the oil, after deducting from such proceeds the sum of $25,000.00 and certain expenses incurred by Smidas in the sale and delivery of the oil.

By contract dated May 26, 1947, Smidas sold the sperm oil produced by the whaling expedition to A.D.M., with the provision that title to the sperm oil would pass to A.D.M. at the time that the sperm oil was delivered to A.D.M. in New York City.

The *Anglo Norse* was reconditioned and equipped for the contemplated expedition entirely in Norwegian shipyards, with the contracts therefor being negotiated, executed, and carried out in respondent's behalf by Norwegians in Norway. All officers and all members of the crews of the several vessels, aggregating about 300 men, were Norwegian and were employed pursuant to contracts negotiated in respondent's behalf in Norway. Certain fuel oil purchases in the United States were arranged for by Smith at the direction of respondent's Norwegian management, to be delivered to the *Anglo Norse* off the western coast of South America.

The *Anglo Norse* and the seven killer boats left Norway on the sperm oil expedition in April, 1947, proceeded to the fishing grounds off the western coast of South America, where fishing for sperm whales and the production of sperm oil was commenced on May 20, 1947. These operations continued until about January 4, 1948, at which time the killer boats returned to Norway. During this entire period the vessels were in constant contact with respondent's management in Norway via shortwave radio and remained under Jahre's supervision.

About half of the sperm oil produced was delivered in October, 1947, to a transport which brought a load of fuel oil to the *Anglo Norse*, and after delivering the fuel oil received the sperm oil from the floating factory, and delivered it to A.D.M. in New York. The balance of the sperm oil was delivered to A.D.M. in New York by the *Anglo Norse* about January 27, 1948. After unloading her cargo of sperm oil the *Anglo Norse* returned to Norway.

Respondent maintained a bank account at the Guaranty Trust Co. of New York, which it opened about February 8, 1947, with a deposit of $125,630.11. Deposits to that account included loans by shareholders and individuals to respondent and the money paid by A.D.M. for the purchase of the sperm oil in the amounts of $1,191,963.84 and $2,287,668.26 for the respective two deliveries, after proper provisions by A.D.M. for use of part of the proceeds to discharge lien indebtedness. The payments from that account consisted, in general of amounts paid at the direction of the Norwegian management to discharge obligations of respondent requiring payment in United States dollars, payments to or for the personal benefit of respondent's Norwegian shareholders (such payments being considered loans to those shareholders), repayment of loans, transfer of funds to Norwegian accounts for use by the Norwegian management, and for the payment of a tanker which was built and purchased in Europe and whose operations are not involved in this controversy. Smith acted as Treasurer of the respondent and in addition to drawing the checks on the Guaranty Trust Co. account maintained financial records in accordance with standard accounting practice.

Respondent did not at any time prior to April 30, 1948, have an office in the United States, nor was it qualified to do business in any state in the United States. It did not at any time have any United States employees. Smith was its sole officer in the United States. Respondent had an office

in Norway, in which and from which it directed and managed its operations. Its board of directors held meetings in New York City on September 29, 1947, October 2, 1947, January 13, 1948, and February 2, 1948, to discuss and approve or ratify corporate procedures and policies. These meetings were called in New York City because it better suited the personal convenience of the directors to come there.

The basis for the assessment was the finding by the Commissioner that under the foregoing facts the respondent was a foreign corporation engaged in trade or business within the United States and that its gross income from the sperm oil expedition was from sources within the United States, thus making the net income taxable income to the respondent under the provisions of Section 231 (b) and (c), Internal Revenue Code of 1939.

On petition to the Tax Court for a redetermination of the deficiency, the Tax Court, with four judges dissenting, held that the respondent was not a resident foreign corporation engaged in trade or business within the United States and that its net income was accordingly not taxable as provided in Sections 14 (c) (1) and 15, Internal Revenue Code of 1939. The Commissioner seeks a review of the decision of the Tax Court.

There is no dispute about the foregoing basic facts, many of them being stipulated. From these facts the Tax Court found that the management contract between respondent and Smidas, and the sales contract between Smidas and the purchaser, A.D.M., were bona fide contracts serving a real business purpose, and were in fact what they appeared to be in form. It pointed out that Smidas was not a corporation organized for tax purposes, or for the particular part it played in this transaction. On the contrary, it had been in existence for some time, had ample assets and was at times engaged in various business activities. The Tax

Court, recognizing the contract of sale between Smidas and A.D.M., said, "We think the facts here clearly show that petitioner was not the owner and seller of the oil."

The fact that the transaction took the form it did for the purpose of avoiding taxes, even if we assume such to be the case, is not sufficient to permit the Court to treat as taxable a transaction which in form is nontaxable, provided the component parts of the transaction are bona fide and not a sham. *United States* v. *Cummins Distilleries Corp.*, 166 F. 2d 17, 20-21, C.A. 6th; *Chamberlin* v. *Commissioner*, 207 F. 2d 462, 468, C.A. 6th, cert. denied, 347 U.S. 918; *United States* v. *Cumberland Public Service Co.*, 338 U.S. 451, 455. The Supreme Court stated in the *Cumberland Public Service Co.* case, "It is for the trial court, upon consideration of an entire transaction, to determine the factual category in which a particular transaction belongs. Here as in the *Court Holding Co.* case we accept the ultimate findings of fact of the trial tribunal." See also: *United States* v. *Cummins Distilleries Corp.*, supra, 166 F. 2d 17, 20 C.A. 6th. Likewise, we accept the findings of the Tax Court in the present case that the contracts involved were bona fide ones, with the result that Smidas, not the respondent, was the owner and seller of the oil.

The Tax Court also found that "Upon the entire record, we are convinced that petitioner was not engaged in any substantial, regular, or continuous ordinary business activity in the United States." This is a finding of fact which we believe is not clearly erroneous and which we are required to accept.

Based upon that finding, the Tax Court concluded that the taxpayer was not "engaged in trade or business within the United States" within the meaning of Section 231 (b), Internal Revenue Code of 1939. Whether a foreign corporation is engaged in trade or business within the United States is a question of fact. *Jan Casimir Lewenhaupt* v.

Commissioner, 20 T. C. 151, 162, affirmed, 221 F. 2d 227, C.A. 9th; *Consolidated Premium Iron Ores, Ltd.* v. *Commissioner*, 28 T. C. 127, 150, affirmed, without reference to this question, 265 F. 2d 320, C.A. 6th; *European Naval Stores Co.* v. *Commissioner*, 11 T. C. 127, 132; *Scottish American Investment Co., Ltd.* v. *Commissioner*, 12 T. C. 49, 54. The fact that the ultimate finding is a conclusion drawn from undisputed or established subsidiary facts does not change such a finding from one of fact to a conclusion of law. Being a finding of fact it is not to be set aside unless clearly erroneous. *Section 7482, Internal Revenue Code of 1954; Rule 52(a), Rules of Civil Procedure; United States* v. *Gypsum Co.*, 333 U.S. 364, 394; *Commissioner* v. *Consolidated Premium Iron Ores, Ltd.*, supra, 265 F. 2d 320, 326, C.A. 6th.

We recognize that there are a number of decisions in several of the circuits, including our own, which hold that where the subsidiary facts are undisputed and no question of credibility is involved, the Court of Appeals is as well qualified as the trial judge to draw inferences and conclusions therefrom, and such inferences and conclusions of the trial judge can be reviewed by the Court of Appeals free of the limitation of the "clearly erroneous" rule. *Seagrave Corp.* v. *Mount*, 212 F. 2d 389, 394, C.A. 6th; *E. H. Sheldon & Co.* v. *Commissioner*, 214 F. 2d 655, 658, C.A. 6th. However, in *Rich* v. *Pappas*, 229 F. 2d 308, 313, C.A. 6th, we concluded that in view of the ruling of the Supreme Court in *United States* v. *Gypsum Co.*, supra, 333 U.S. 364, 394, the conclusions of the trial judge, even though drawn from undisputed facts, were findings of fact which were not to be set aside unless clearly erroneous. We followed this new ruling, with one judge dissenting, in *Dixie Sand & Gravel Corp.* v. *Holland*, 225 F. 2d 304, 308, 314, C.A. 6th, and again in *Commissioner* v. *Consolidated Premium Iron Ores, Ltd.*, supra, 265 F. 2d 320, 326, C.A. 6th. However,

some members of the Court have been of the opinion that the rule as stated in the earlier *Seagrave Corp.* and *E. H. Sheldon & Co.* cases was the correct and better rule and have followed it in recent cases. *Yunker* v. *Commissioner*, 256 F. 2d 130, 133, C. A. 6th; *Gudgel* v. *Commissioner*, 273 F. 2d 206, 209-210, C. A. 6th.

The Supreme Court has very recently expressed its opinion in what we believe is an analogous situation. In *Commissioner* v. *Duberstein*, decided June 13, 1960, the question presented was whether under certain facts and circumstances the transfer of a Cadillac automobile from one businessman to another constituted a "gift" within the meaning of the statute which excludes from the gross income of an income taxpayer "the value of property acquired by gift." The Court stated that decision of the issue must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case, that primary weight in this area must be given to the conclusions of the trier of fact, and although it may not satisfy an academic desire for precision in this area, the question remained basically one of fact, for determination on a case-by-case basis. The opinion states, "One consequence of this is that appellate review of determinations in this field must be quite restricted. . . . Where the trial has been by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.' *Fed. Rules Civil Proc. 52(a).* . . . *The rule itself applies also to factual inferences from undisputed basic facts*, . . ., as will on many occasions be pre ented in this area. . . . And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I.R.C. Sec. 7482 (a)." (Emphasis added.) The opinion refers to its previous ruling in *United States* v. *Gypsum Co.*, supra, 333 U. S. 364, 394, which we previously considered controlling in *Rich* v.

Pappas, supra, 229 F. 2d 308, 313, C.A. 6th. Accordingly, in the present case, we construe the ultimate findings of the Tax Court, drawn from undisputed or established subsidiary findings, as findings of fact which are not to be set aside unless clearly erroneous.

In our opinion, the conclusions of the Tax Court that the respondent was not engaged in trade or business within the United States is not clearly erroneous and must be accepted on this review. As the Tax Court pointed out, the business in which respondent was engaged, treating the contracts between the parties as bona fide contracts serving a real business purpose, was that of managing the expedition for Smidas, and its activities which produced the income in question took place almost entirely on the high seas or in Norway. It was not, during some substantial portion of the taxable year regularly and continuously transacting a substantial portion of its ordinary business in the United States, which is a necessary requirement before a taxpayer can be found to be "engaged in trade or business within the United States." *Lewellyn* v. *Pittsburgh, B. & L. E. R. Co.*, 222 F. 177, 185-186, C.A. 3rd; *European Naval Stores Co.* v. *Commissioner*, supra, 11 T. C. 127, 133; *Scottish American Investment Co., Ltd.* v. *Commissioner*, supra, 12 T. C. 49, 59; *Linen Thread Co., Ltd.* v. *Commissioner*, 14 T. C. 725, 736.

The decision of the Tax Court is affirmed.

SIMONS, Senior Judge, (dissenting). Out of the organization, operation and activities of the respondent in a whaling venture which resulted in very substantial profit, there emerged a tax controversy culminating in a determination by the petitioner of a deficiency in respondent's income tax return for the fiscal year ending April 30, 1948. The Tax Court held respondent's income from the venture not taxable, as provided in Sections 14 (c) (1) and 15 of the In-

ternal Revenue Code of 1939. The petitioner seeks review of that holding.

The controlling question is whether the respondent, during its taxable year, was a "resident . . . foreign corporation engaged in trade or business within the United States," as that phrase is used in Section 231 (b) I. R. C. of 1939 as amended and whether the respondent, during the tax year, derived "gross income from sources within the United States," as that phrase is used in Section 231 (c) I. R. C. of 1939. The Tax Court supported its conclusion by lengthy and detailed findings of facts and I accept the evidentiary facts as found. Whether they support the legal conclusion at which the Tax Court arrived is the heart of the controversy. I shall endeavor to summarize the facts as best I may.

The purpose of the venture was to obtain sperm oil, which is obtained from the sperm whale and is used for industrial purposes, primarily as an additive to lubricants. Norway was the largest producer of whale oil in the world and an American corporation styled Archer-Daniels Midland Company, hereinafter referred to as ADM, was the largest refiner of sperm oil in the world. In 1946, sperm oil was in short supply, primarily because the Norwegian whaling fleets had been depleted by enemy action during World War II and because whaling fleets then in operating condition were required for other purposes. Werner G. Smith, a citizen of the United States residing in Cleveland, was a director and executive vice president of ADM. He was its highest paid officer and was in charge of the division of its business known as the Werner G. Smith Company. This had been owned and operated by Smith independently but had been absorbed by ADM with Smith remaining in an executive capacity. The nature of its business required that ADM make long time commitments to its customers and so it sought to maintain large inventories and to

establish assured sources of supply. During the period here involved, there was a great demand for sperm oil and a limited supply because of which ADM faced a critical business need. In an effort to meet it, Smith contacted two Norwegian citizens by the names of Hans Bull Ovrevik and Magnus Konow. Hans Bull, as Ovrevik was known, was a broker in sperm oil and Konow was a shipowner and a former manager of a Norwegian whaling company.[1] These individuals, in turn, approached Anders Jahre, one of Norway's leading whalers, to inquire whether he would be interested in organizing a new whaling company to engage in the production of sperm oil. They indicated that they would like to join Jahre in such a venture and that Smith in the United States would be interested, if by that method he could secure sperm oil for ADM. Jahre was willing to organize a company but suggested that it would be necessary first to secure a suitable factory ship.

Thereafter, Jahre caused the Falkland Shipowners Limited, a British corporation which he controlled, to acquire from the British government an old factory ship called the "Anglo-Norse." Jahre had at his disposal sufficient "killer boats" to outfit a whaling expedition. On June 22, 1946, Jahre prepared a memorandum which he circulated among the parties interested in the proposed whaling expedition and, as a result, Smith went to Europe, met with the others in Norway, where a memorandum was initialed which provided that an operating company be formed, that the capital stock of the company ($200,000.00) be subscribed 40% by Smith and 60% divided among the others; that the stockholders would lend the company $200,000.00 in proportion to their stockholdings, that a syndicate be formed composed of the stockholders, that the entire production of sperm oil by the operating company would be sold to the syndicate, and then resold to the Smith Division of ADM, and that

[1] Konow later retired from the project.

ADM would lend the new company up to $500,000.00. Upon Smith's return to the United States, he discussed the proposed agreement with his attorney, Clayton A. Quintrell, who objected to the syndicate arrangement and it was abandoned.

Meanwhile, the price of sperm oil in the world markets had increased substantially and the labor and reconversion of the Anglo Norse found to cost more than anticipated so the Norway parties advised that oil could not be sold to ADM for $280.00 per ton. After consulting with the president of ADM, Smith indicated to the Norwegians that ADM would be willing to pay $320.00 per ton. Early in December, Jahre, Bull and Smith met in New York City and caused the respondent to be incorporated under the laws of the Republic of Panama. Jahre, Bull and Smith became its directors. They held their first meeting in New York City. The Tax Court found that Smith made his investment in the respondent in order to obtain an adequate supply of sperm oil for ADM.

At the first meeting of the directors, Jahre, acting for the respondent in New York, signed a sales contract between the respondent, as seller, and ADM, as buyer. While this contract provided that title to all sperm oil produced by respondent should pass to ADM upon the placing of oil in the tanks of the factory vessel, the proposed sales contract was never signed by ADM and never had operative effect. Shortly thereafter, on December 12, 1946, Jahre, in Norway, sought to formalize an arrangement with respect to the "Anglo Norse" by obtaining a charter for the ship from Falkland. Since the latter was a British corporation, it could not execute such charter to a foreign corporation without the approval of the British Government. The latter refused its consent on the ground that Panama had not subscribed to the international whaling agreement.

This decision jeopardized the entire sperm oil venture. Jahre first proposed that ADM charter the "Anglo Norse" but ADM refused to be a party to such arrangement. The respondent's Norwegian shareholders then proposed to Smith that the Smidas Company, Inc. charter the vessel and work out some relationship with the respondent for the conduct of the expedition. Smidas accepted the proposal.

This is the first reference to Smidas in the court's factual narrative and I digress for a moment. Smidas is an American export corporation, formed in 1945. Smith owned 54.5% of its stock acquired at its incorporation and was also its Secretary-Treasurer. Its business was to promote exports of certain technical items and its income was derived from commissions and fees. Nothing in the findings indicates that Smidas was active, or even interested in sperm oil, or that it participated in any way in the organization of the respondent. It was, however, available to Smith by reason of his controlling interest. There is no evidence or finding that Smidas contributed anything to the organization of the respondent, or received any part of the purchase price from ADM.

I return to the Tax Court's narrative. Smidas authorized a contract to be signed by Smith, as its Secretary-Treasurer, to charter the "Anglo Norse" and it was chartered on or about February 5, 1947, in its name. During the fiscal year, various credit arrangements were worked out by the respondent. Jahre negotiated for it a credit of 300,000 British pounds from Lazard, a London banker. Additional loans were obtained from respondent's stockholders and from ADM in order to carry on operations. While, on February 21, 1947, a contract was entered into between respondent, as seller, and ADM, as buyer, of the oil to be produced, it was later rescinded when Smith's attorney, Quintrell, pointed out that Smidas and not respondent was to be the legal owner of the oil. Two new contracts were

thereafter drawn . . . one between the respondent and Smidas, on March 8, 1947, and a sales contract between Smidas and ADM, dated May 26, 1947. Under the first, respondent was to manage the operations, furnish the "killer boats," hire personnel, pay all expenses and insurance, assume all the obligations of Smidas, and exonerate Smidas from liability relating to the whaling operations. Smidas, in turn, was to enter into a contract with ADM to sell it all the oil produced at $320.00 per ton and to pay the entire proceeds to respondent for services and for undertaking the burdens, expense and risks, less $25,000 which it would retain along with any selling expenses. The sales contract between Smidas and ADM provided that title pass in New York City upon the delivery of the oil.

The venture was launched. "Killer ships" were acquired, crews hired and repairs on the "Anglo Norse" made. Smith, in the United States, arranged for fuel to be delivered to the ships while at sea. The expedition began in April, 1947, and operations continued in South American fishing grounds until about January 4, 1948. The operations under Jahre's supervision produced 15,357 tons of sperm oil. Part of the oil was delivered to ADM at New York City by private transport, in October, 1947, at which time ADM paid the purchase price of $2,622,343 in the following manner: $1,429,900 was paid by ADM directly to the banker, Lazard, to discharge its lien and the balance was deposited by ADM to the respondent's account with the New York Guaranty Trust Company. On January 27, 1948, the "Anglo Norse" delivered the rest of the oil to ADM in New York and the purchase price of $2,287,668 was deposited in the New York bank account of the respondent. This account had been opened in order to pay the respondent's obligations in the United States. Another account had also been opened in a Norwegian bank. Smith could make withdrawals from the New York account but orally agreed to

first secure approval by the Norwegians. All books and records, other than those involved in the New York bank account, were kept in Norway. Four directors' meetings were held in New York City and several informal meetings in Norway.

The respondent reported net income of $810,576.38—later adjusted to $924,979.72—for the fiscal year but denied tax liability on it. The Commissioner determined a deficiency of $351,492.29. The Tax Court, however, held there was no deficiency, since Smidas was the owner of the oil sold to ADM in New York and respondent was not engaged in any substantial, regular, or continuous business activity in the United States. Four judges of the Tax Court dissented, taking the view that in reality respondent conducted the whole whaling operation and Smidas was its "mere agency or instrumentality."

The question to be determined was whether the respondent was "engaged in a trade or business within the United States" as defined in Sec. 231 (b) of the 1939 Internal Revenue Code, (26 U.S.C. 1952 ed.) which reads:

> "(b) Resident Corporations. A foreign corporation engaged in trade or business within the United States shall be taxable as provided in Section 14 (c) (1) and Section 15."

Most of the activities cited by the petitioner as having taken place within the United States were, in the opinion of the Tax Court, without substance including the arrangement for the discharge of the oil when it was delivered in New York, the legal services performed by Quintrell, his position as assistant secretary of the respondent, payment of obligations required to be paid in American dollars out of the bank account with the Guaranty Trust Company, or the holding of directors' meetings in New York. They were considered by it as ministerial and clerical in nature, involving little exercise of discretion or business judgment

necessary to the production of the income in question. The holding of directors' meetings in New York were solely, it was said, for the personal convenience of the directors, with no particular consequence in any major aspect.

The Court reasoned that the fact that the whaling enterprise was under the management of the respondent at the time the oil was delivered was not enough to require a holding that the respondent was engaged in trade or business within the United States. It contended that to be engaged in trade or business within the United States the taxpayer must, during a substantial portion of the taxable year, have been regularly or continuously transacting a substantial portion of its ordinary business in this country, and this the respondent did not do. The respondent is therefore, not a resident foreign corporation engaged in trade or business within the United States and not taxable as provided in Section 14 (c) (1) and 15 of the Internal Revenue Code of 1939.

The four dissenting Tax Court judges disagreed. They relied upon holdings wherein the Supreme Court has repeatedly taken the position that the incidence of taxation depends upon the substance of a transaction and not its form. *Gregory* v. *Helvering*, 293 U.S. 465, *Commissioner* v. *Court Holding Company*, 324 U.S. 331, and *Griffiths* v. *Commissioner*, 308 U.S. 355. They relied on the observation of the Supreme Court in the latter case: "We cannot too often reiterate that taxation is not so much concerned with the refinements of title as it is with actual command of the property taxed, the actual benefit for which the tax is paid" and on the reasoning of the Supreme Court in *Corliss* v. *Bowers*, 281 U.S. 376, 378. The dissenters deemed it clear that in reality the respondent conducted the whole whaling operation and the sale of the oil and that Smidas was a "mere agency or instrumentality" used by the respondent for chartering the "Anglo Norse." They point out that the respondent assumed all the obligations

of Smidas under the charter party, procured the "killer boats," outfitted each vessel, hired all necessary personnel, procured the insurance, conducted the whaling operations, paid all expenses, delivered at least a part of the oil and directly received the proceeds from the sale of the oil. Whereas, in form, the contract provided that the respondent would manage, finance and operate the expedition for Smidas, the respondent received payment of the entire proceeds from the sale of the oil except $25,000 which would be retained by Smidas. In reality, it was the respondent which received all the proceeds and paid Smidas for what appears to have been merely entering into the charter agreement. All the oil was sold in the United States and since the delivery and sale of products are the most important functions of a business for profit, it is clear that the respondent was engaged in trade or business within the United States within the meaning of Section 231 (b) of the Internal Revenue Code of 1939 and, therefore, taxable upon income from sources within the United States.

I agree with the reasoning of the dissenting judges. To it, I may add that the whole enterprise was a unified venture by which Smith, as the dominating spirit, sought and succeeded in obtaining sperm oil for ADM without which the economic status of ADM would be greatly jeopardized. To this end, Smith interested the Norwegian whaling interests and when faced by an impasse in respect to the charter of the "Anglo Norse," and after refusal of ADM to act as the charter party, secured the assistance of one of his own corporations, Smidas. The result was the delivery of processed oil finally to ADM though preliminary agreements indicated a differing program, directed to the same end. It is idle in considering what is meant by being "engaged in trade or business within the United States" to submit an enterprise to the test of whether the activity is normal, regular, or continuous in other enterprises in

ordinary times. By its very nature, the present venture contemplated a "one shot" operation with substantial profits envisioned by the unusual circumstances that existed in an abnormal time.

We had occasion in *Commissioner of Internal Revenue* v. *Ashland Oil & R. Co.*, 99 F. 2d 588, to study the problem of the relationship between form and substance in tax cases in a different environment, where we concluded that: "The question remains, however, whether if the entire transaction, whatever its form, was essentially in intent, purpose and result, a purchase by Swiss of property, its several steps may be treated separately and each be given an effect for tax purposes as though each constituted a distinct transaction. . . . the courts have recognized that where the essential nature of a transaction is the acquisition of property, it will be viewed as a whole, and closely related steps will not be separated either at the instance of the taxpayer or the taxing authority."

It is true that we are dealing with just one sale involving two deliveries of oil to the United States. It must be noted that the transaction in the United States was the culmination of all of the respondent's business activity. It involved an expedition which was at sea for over nine months, produced 15,357 tons of sperm oil, a purchase price of over three million ($3,000,000) dollars, and a net income of $924,979.00. These end results were brought about by the sale in the United States which accounted for over 90% of respondent's total income for the tax year. I conclude that all activities ending in the resulting sale in the United States constituted the respondent being engaged in trade or business within the United States under Section 231 (b) I. R. C.

I believe the decision should be reversed and the cause remanded for a determination of the amount of income attributable to sources within the United States within Section 231 (c) I. R. C.